

# U.S. Department of Labor

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Date issued: May 2, 2003

**CASE NO.: 2002-AIR-27**

*In the Matter of:*

**JULIE ROBICHAUX,**  
*Complainant,*

v.

**AMERICAN AIRLINES,**  
*Respondent.*

## **DECISION AND ORDER**

This matter arises under the employee protection provision of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21<sup>st</sup> Century, 49 U.S.C. § 42121 ("AIR 21" or "the Act"), as implemented by 29 C.F.R. Part 1979 (2002). This statutory provision, in part, prohibits an air carrier, or contractor or subcontractor of an air carrier, from discharging or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration ("FAA") or any other provision of Federal law relating to air carrier safety. 49 U.S.C. § 42121(a).

## **PROCEDURAL BACKGROUND**

Complainant Julie Robichaux ("Complainant" or "Robichaux") is employed by American Airlines ("Respondent," "American," or "AA") as an aircraft dispatcher. On July 2, 2002, Complainant filed a complaint with the Occupational Safety and Health Administration, U.S. Department of Labor, alleging that Respondent had discriminated against her in violation of Section 42121 of the Act.

On August 23, 2002, after an investigation of the complaint, the Deputy Regional Administrator for OSHA notified the parties that he found no violation of the Act's employee protection provision. On September 19, 2002, Complainant objected to the findings and requested an administrative hearing pursuant to 49 U.S.C. § 42121(b)(2)(A).

A Notice of Hearing dated October 10, 2002 was issued, and a hearing date of

December 9, 2002 was set. A hearing commenced on that date and concluded on December 10, 2002 in Dallas, Texas.

### **FACTUAL BACKGROUND**

Complainant has worked for American Airlines as a licensed dispatcher since 1990. (Tr. 9). She currently works in the American SOC (Systems Operation Control) facility at the Dallas-Fort Worth airport in Dallas, Texas. As a dispatcher, she is responsible for flight planning in relation to American Airlines flights. This encompasses pre-flight planning, including weather and fuel issues, dispatch or release of the flight, and following the flight while en route. (Tr. 11). This action arises from alleged retaliation by American based on a safety complaint filed by Complainant relating to the handling of AA Flight 63.

On December 22, 2001, Complainant was the dispatcher on AA Flight 63 from Paris, France to Miami, Florida. (Tr. 17-18). Aboard this flight was passenger Richard Reid, now known as the “shoe bomber.” While en route across the Atlantic Ocean, Passenger Reid attempted to light his shoes on fire. The shoes were later determined to contain some sort of explosive device. He was subdued by the flight crew and other passengers and was unsuccessful in detonating the explosives. (Tr. 18-20).

The captain of AA Flight 63 contacted Complainant to alert her of the situation. (Tr. 19). Over the course of the next few hours, Complainant was in contact with the captain of AA 63, the FBI and other law enforcement, NORAD, and AA security and SOC center management. In addition to handling AA 63, Complainant was also responsible for the dispatch of her other assigned flights. Complainant re-routed AA 63 to land in Boston, Massachusetts, where it landed without further incident. (Tr. 24-25).

The following day, Complainant filed an ASAP (American Airlines’ Safety Action Program)<sup>1</sup> report with AA and the FAA. (Tr. 28). Specifically, Complainant alleged violations of Federal Aviation Regulations (“FAR”) 121.663 and 121.107. (Respondent’s Exh. 1). She complained that during the AA 63 situation, she was not relieved of her duties relative to other flights under her dispatch, even though she requested additional help. According to Complainant, she was told to manage all her flights as best she could. (Tr. 25). As such, Complainant alleged a violation of FAR 121.107, asserting that AA did not have enough dispatchers working at the center at the time of this incident to adequately monitor the air traffic. (Resp.’s Exh. 1).

Further, Complainant alleged that SOC international sector manager Jack Helmbrecht attempted to usurp her authority to dispatch AA 63, in violation of FAR 121.663. Complainant stated that Mr. Helmbrecht instructed the captain to land in Canada, despite her recommendation that the flight continue on to Boston. Despite this conflict, Complainant did

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<sup>1</sup>An ASAP report is AA’s internal safety violation reporting system.

retain authority over the flight. (Resp.'s Exh. 1).

American conducted an investigation into the ASAP report. The investigation was conducted by the Event Review Team (ERT), a committee consisting of representatives from management and the Transport Workers Union Local 542.<sup>2</sup> The ERT investigation concluded that there was a difference in perception between the Complainant and AA management and found there were no FAR violations. The ERT re-opened the investigation at the Complainant's request and heard testimony from Complainant and others involved in the situation. (Tr. 29).

On May 27, 2002, Complainant was again involved in the dispatch of a flight on which a security issue arose. On an AA flight from JFK to Zurich, a passenger was disembarked for refusing to turn off his laptop computer as requested by flight attendants. (Tr. 35-36). Complainant informed SOC management, who determined that the incident did not pose a security threat. (Tr. 36). In addition, at a similar time, another dispatcher working near Complainant had an issue of passengers on an AA flight (also to Zurich) synchronizing their watches. (Tr. 36-39). Again, SOC management was informed of the situation and determined it did not pose a security threat. (Tr. 38).

Following these two incidents, Complainant drafted a short message regarding the events, which she subsequently sent to all the flights under her dispatch through ACARS.<sup>3</sup> (Tr. 38-39). The text of the message is as follows:

This is just a heads up from me to you. A few hours ago we had 2 different flights headed to ZRH with persons onboard that were making the other passengers nervous. On the DFW-ZRH flight there were several people from India who according to passengers said that they were synchronizing their watches. The flight is continuing on. On the JFK-ZRH flight, a passenger from Pakistan would not turn off his computer for departure. He was being removed as a passenger misconduct. I do not want to alarm you but I would like everyone to be extremely vigilant and follow all security procedures. I will let you know if anything else develops.

(Complainant's Exh. 3). Complainant avers that she sent this message as a precaution to alert

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<sup>2</sup>The TWU consists of dispatchers, meteorologists, and operation specialists for a number of airlines. Complainant is a member of this union.

<sup>3</sup>ACARS (Airborne Communications Addressing and Reporting System) is a communication system by which the dispatcher can send written transmissions to the cockpit while the flight is in the air. It is similar to an email message.

flight crews to potential security breaches. (Tr. 39).

When SOC management learned of Complainant's transmission, she was required to attend a counseling session with SOC management and a union representative. (Tr. 40). The gist of the counseling session was the inappropriateness of her message, as it had not been authorized by management. (Tr. 41). According to AA policy, official security information is only to be transmitted through or at the request of AA management. During the counseling session, Complainant stated that she understood the inappropriate nature of her actions and she would not send another similar message. (Tr. 42-43).

The counseling session was memorialized with a CR-1 entry in Complainant's file. (Comp.'s Exh. 3). A CR-1 is essentially an internal personnel log which is kept for each AA dispatcher. The log is used to record both positive and negative performance issues. A CR-1 is a part of AA's disciplinary process, the PPC (Peak Performance through Commitment), although it is not always used to address negative performance issues. The PPC involves a three step process by which employees can be subject to discipline: a first step advisory letter, a second step advisory letter, and a career decision day. The first and second step advisory letters are essentially warnings which can be used to support further discipline. The career decision day is the final step before termination or resignation occurs. (Tr. 165-168).

Complainant was not issued a first or second step advisory letter. (Tr. 170). Rather, her behavior was noted in a CR-1, which is a separate and distinct type of personnel action. Complainant was warned that repetition of her actions would result in the issuance of a first step advisory letter. (Tr. 42).

On June 12, 2002, Complainant filed a complaint with the U.S. Department of Labor and the FAA, requesting whistleblower protection. (Tr. 43, Resp.'s Exh. 1). Since the incident, Complainant has not been terminated by AA and continues to work as a dispatcher in the same capacity. Complainant has not been subjected to a decrease in pay, hours worked, or benefits received. (Tr. 169). She has returned to "business as usual." (Tr. 139).

### **STATUTORY PROVISIONS**

The employee protection provision of AIR 21 provides that no air carrier may discharge or otherwise discriminate against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee "provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States." 49 U.S.C. § 42121(a)(1).

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The jurisprudence developed under existing whistleblower statutes, specifically the Energy Reorganization Act of 1974 (“ERA”), as amended in 1992, the Whistleblower Protection Act (“WPA”), and environmental statutes provide the framework for litigation under AIR21. *See Davis v. United Airlines, Inc.*, 2001-AIR-5 (ALJ July 25, 2002). The burden of proof standards are also identical to those of the environmental cases. The complainant must first establish a prima facie case. 49 U.S.C. § 42121(b)(2)(B)(i). However, even if the complainant establishes a prima facie case, raising an inference that the protected activity was a contributing factor in the adverse action alleged in the complaint, the respondent can still avoid liability by proving with clear and convincing evidence that it would have taken the same adverse action in the absence of the employee’s protected activity. 49 U.S.C. § 42121(b)(2)(B)(ii).

To establish a prima facie case, a complainant must show (1) that the complainant engaged in protected activity as defined by the Act, (2) that the employer knew complainant engaged in protected activity, (3) that the complainant suffered an adverse employment action, and (4) a nexus between the alleged adverse action and the protected activity sufficient to raise an inference that the protected activity was a contributing factor in the adverse action. 29 C.F.R. § 1979.104(b).

There is no dispute that Complainant engaged in protected activity of which American was aware. Twenty-nine C.F.R. § 1979.102(b) prohibits discrimination against an employee because that employee provided the employer or the Federal Government with “information relating to any violation or alleged violation of any order, regulation or standard of the Federal Aviation Administration.” Discrimination against an employee because that employee has filed “a proceeding relating to any violation or alleged violation of any order, regulation or standard of the FAA” is also prohibited. 29 C.F.R. § 1979.102(b)(2).

Complainant filed an ASAP report with American and the FAA. (Tr. 28). In this report, she alleged violations of Federal Aviation Regulations relating to the handling of the Richard Reid incident (Resp.’s Exh. 1). Her ASAP report became the subject of a meeting of the ERT, as well as further investigation. (Tr. 29). This is clearly protected activity under the Act, as AIR21 prohibits discrimination based on the filing of a report or the providing of information relating to an alleged violation of FAA regulations.

The central issue is whether the allegedly retaliatory action, a CR-1 entry in Complainant’s file, rose to the level of adverse employment action. To establish adverse employment action, a complainant must show that the action had some tangible job consequence. *See Shelton v. Oak Ridge National Laboratories*, 1995-CAA-19 (ARB March 30, 2001). Possible tangible job consequences include termination, demotion, decrease in salary, benefits, responsibilities or title. *Id.*; *see also Oest v. Illinois Dep’t of Corrections*, 240 F.3d 605 (7<sup>th</sup> Cir. 2001). Absent a showing of tangible consequences, mere criticism or

negative performance evaluations cannot be considered adverse action. *Ilgenfritz, Jr. v. U.S. Coast Guard Academy*, 1999-WPC-3 (ARB August 28, 2001). An “Oral Reminder” is not adverse action without tangible job consequences such as termination, demotion, or decrease in salary. *Shelton*, 1995-CAA-19.

In the *Shelton* case, a whistleblower claim brought under the environmental acts, the action was an oral reminder that was memorialized with a memorandum in the complainant’s personnel file. The complainant was reprimanded for her use of abusive language with a co-worker. The oral reminder was the lowest or first step in the disciplinary process and the memorandum was held in the complainant’s file for six months, after which time it was removed. The complainant did not assert that the oral reminder and memorandum had any tangible job consequences, only that the memorandum placed in her file had the potential to lead to one of these actions. The complainant had not been terminated or demoted, nor had she suffered any loss in pay or hours as a result of the oral reminder. Consequently, it was held that absent a showing that the oral reminder and memorandum had a tangible impact on the complainant’s employment, the action did not rise to the level of adverse action as required under the environmental acts. *Shelton*, 1995-CAA-19.

The *Shelton* case is strikingly similar to this case: Complainant was ordered to participate in an oral counseling session, which was memorialized in a CR-1 entry in her personnel file. As discussed above, the CR-1 entry is not itself considered disciplinary in nature, although this particular CR-1 was entered to address negative performance issues. Despite Complainant’s assertions that the CR-1 entry is the first step in the disciplinary process, standing alone, the CR-1 entry has no tangible job consequences. Complainant has admitted that the CR-1 entry has not been the basis for any demotion, discharge, loss of pay, benefits, or hours, or other negative consequences. Without a showing of tangible job consequences arising from the CR-1 entry, Complainant has not established that the action taken was adverse in nature.

In *Shelton*, the ARB went on to note that a reprimand cannot be “considered adverse simply because each reprimand may bring an employee closer to termination.” *Id.* Without additional misconduct by the employee, the previous reprimand cannot be the sole basis of future discipline. In this case, the CR-1 entry by itself cannot be used for future disciplinary action; there must be additional negative performance to support the next step in the disciplinary process. Although the CR-1 entry will remain indefinitely in Complainant’s file, it can only be used in future disciplinary action for two years from the date of issue. (Tr. 170). The fact that the CR-1 entry, coupled with additional misconduct by the Complainant, could lead the Complainant closer to termination is too tenuous to support a finding of adverse action. Complainant acknowledged that her actions which gave rise to the CR-1 were incorrect and agreed to refrain from similar conduct in the future. Just as the oral reminder and memorandum in the *Shelton* case, the CR-1 entry alone is not sufficient to be considered adverse action. As such, Complainant has not shown that the CR-1 entry is adverse action under the Act.

In addition, not all adverse employment acts are considered actionable. *See Ilgenfritz*, 1999-WPC-3. Employer criticism, while perhaps not flattering or agreeable to the employee, is a necessary and appropriate “feature of the workplace.” *Id.*, citing *Davis v. Town of Lake Park*, 245 F.3d 1232 (11<sup>th</sup> Cir. 2001). Absent tangible job consequences, actions such as negative performance evaluations do not rise to the level of adverse action required to be actionable under AIR21. In this case, the CR-1 entry resembles a reprimand. Complainant may not be pleased with its inclusion in her file; nevertheless, without tangible job consequences, it is not an adverse action in and of itself.

Complainant has failed to show that she was subject to an adverse employment action, an essential element of her prima facie case. 29 C.F.R. § 1979.104(b)(iii).<sup>4</sup> As a result, Complainant has not established a case sufficient to support her claim under AIR21. It is therefore unnecessary to address the remaining elements of Complainant’s claim. Accordingly, this case is hereby **DISMISSED**.

**SO ORDERED.**

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**JOHN M. VITTON**

*Chief Administrative Law Judge*

**NOTICE OF APPEAL RIGHTS:** This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110 (2002), unless a petition for review is timely filed with the Administrative Review Board (“Board”), U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Any party desiring to seek review, including judicial review, of a decision of the administrative law judge must file a written petition for review with the Board, which has been delegated the authority to act for the Secretary and issue final decisions under 29 C.F.R. Part 1979. To be effective, a petition must be received by the Board within 15 days of the date of the decision of the administrative law judge. The petition must be served on all parties and on the Chief Administrative Law

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<sup>4</sup>It is well established that once a case is fully tried on the merits, prima facie case analysis usually loses its functionality. *See, e.g. Mourfield v. Frederick Plaas & Plaas, Inc.*, ARB Nos. 00-055 and 00-056, ALJ No. 1999-CAA-13 (ARB Dec. 6, 2002). In some instances, however, prima facie case analysis remains of value even after a case is fully tried. *See, e.g. Jenkins v. United States Environmental Protection Agency*, ARB No. 98-146, ALJ No. 1998-SWD-2 (ARB Feb. 28, 2003) (ARB use of prima facie case analysis to narrow issues for review). In the instant case, however, regardless of whether viewed as a failure to establish a prima facie case or a failure to carry the ultimate burden of proof on an essential element of the cause of action, the result is the same.

Judge. If a timely petition for review is filed, the decision of the administrative law judge shall be inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board. The Board will specify the terms under which any briefs are to be filed. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b).